

NATIONAL WILDLIFE FEDERATION, APPELLANT
v.
BOLTEN RANCH, INC., RESPONDENT

IBLA 72-435

Decided May 3, 1976

Appeal from an order by Administrative Law Judge Dent D. Dalby dismissing an appeal by National Wildlife Federation from a decision of the District Manager, Rawlins District Office, Bureau of Land Management, Rawlins, Wyoming, granting a grazing license to Bolten Ranch, Inc. (Wyo. 3-72-1).

Administrative Law Judge's order reversed. Grazing license to remain in effect.

1. Grazing Permits and Licenses: Appeals

The right to appeal a decision of a district Manager is not necessarily limited to an applicant for a grazing license or permit, but may belong to "any other person" adversely affected by such decision. 43 CFR 4.470(a) and (b).

2. Words and Phrases -- Grazing Permits and Licenses: Appeals

Any other person. "Any other person" within the context of 43 CFR 4.470 includes one who has standing to protest or appeal a decision of the District Manager. An organization which alleges that one or more of its members has been adversely affected by such a decision may be considered "any other person" within the meaning of the regulation.

3. Grazing Permits and Licenses: Generally

Sanctions may not be imposed upon a grazing license pursuant to 43 CFR

4113.1 for certain alleged activity, unless such activity violates the terms or conditions of the license, the Taylor Grazing Act, a provision of 43 CFR Part 4110, or of any approved special rule.

4. Grazing Permits and Licenses: Generally -- Secretary of the Interior

The Secretary of the Interior or his delegate is not obligated to issue a grazing permit or license to an applicant; the issuance of such permits or licenses is committed to agency discretion; therefore, the Secretary may refuse to issue or to renew such license where the applicant, to enhance his grazing operation, has violated the terms of a statute or regulation prohibiting the killing of wildlife.

5. Grazing Permits and Licenses: Generally

Renewal of a grazing license by a District Manager is not an abuse of discretion where the licensee is accused of illegally killing bald and golden eagles but no administrative hearing or judicial proceeding has yet been held to determine said licensee's guilt, where nonrenewal would not necessarily prevent the licensee from continuing to graze cattle pending disposition of such proceeding, and where the renewed license contains a provision allowing for its reduction, cancellation, or revocation in the event the licensee is found to have illegally killed eagles after an administrative or judicial proceeding.

6. Grazing Permits and Licenses: Generally

Where the transferee of a grazing license has knowledge that such license might be in jeopardy because of illegal activities allegedly involving his transferor, a hearing to determine the guilt of the transferor would serve no useful

purpose where the alleged principal culprit of the illegal activities is dead, all criminal charges against the transferor have been dismissed, and the transfer itself does not appear to have been made to escape the imposition of sanctions.

APPEARANCES: Victor H. Kramer, Esq., David B. Weinberg, Esq., and Kenneth S. Kamlet, Esq., Washington, D.C., for appellant; William H. Brown, Esq., Brown, Drew, Apostolos, Barton & Massey, Casper, Wyoming, for respondent.

OPINION BY CHIEF ADMINISTRATIVE JUDGE FRISHBERG

By letter dated February 22, 1972, the District Manager, Rawlins District Office, Bureau of Land Management (BLM), Rawlins, Wyoming, informed National Wildlife Federation (NWF) that he was granting the application of Bolten Ranch, Inc. (Bolten), for a license to graze livestock on the federal range in the Rawlins District. NWF had protested the issuance of the license and had participated in the protest meeting which the Rawlins District Advisory Board held on February 10, 1972, in Rawlins, Wyoming. At that time the Advisory Board recommended that the application of Bolten be approved.

NWF appealed the granting of the license, and the case was referred to an Administrative Law Judge. By order dated May 9, 1972, Administrative Law Judge Dent D. Dalby dismissed the appeal, holding that since NWF was not an applicant for a grazing license or permit, it did not have standing to appeal the District Manager's decision.

NWF appealed Judge Dalby's decision to this Board.

Throughout the various proceedings NWF has sought the nonrenewal of Bolten's grazing privileges. The basis for NWF's concern is the illegal killing of American bald and golden eagles, which allegedly took place on and around the Bolten Ranch. NWF contends that one Herman Werner, the president and apparent sole stockholder of Bolten Ranch, Inc., participated in or sanctioned such killings. NWF argues that by such action Werner violated Departmental regulations and that the Department was obligated to take disciplinary action under 43 CFR 4113.1. Such section reads as follows:

A grazing license or permit may be suspended, reduced, or revoked, or renewal thereof denied for a clearly established violation of the terms or conditions of the license or permit, or for a violation of

the act or of any of the provisions of this part, or of any approved special rule.

We hold that the Judge was in error. He stated that the appeal procedure was governed by 43 CFR 4.470(a), which states:

(a) Any applicant whose interest is adversely affected by a final decision of the district manager may appeal to an examiner [now administrative law judge] by filing his appeal in the office of the district manager within 30 days after receipt of the decision.

[1] It is clear when the cited regulation is read in its entirety that the appeal right is not limited to conflicting grazing applicants. Subsection (b) of 43 CFR 4.470 reads:

(b) Any applicant for a grazing license or permit or any other person who, after proper notification, fails to protest or appeal a decision of the district manager within the period prescribed in the decision, shall be barred thereafter from challenging the matters adjudicated in such final decision. [Emphasis added.]

Although subsection (a) speaks only of "any applicant," subsection (b), in addition to mentioning "any applicant," speaks of "any other person." If "any other person" could be foreclosed from appealing the decision for not acting in a timely manner, the clear implication is that such person originally had the right to appeal, and we so construe the regulation.

[2] While we do not decide whether a total stranger to a proceeding would have standing, the Supreme Court has made it clear that an organization whose members are injured may represent those members in a proceeding for judicial review. NAACP v. Button, 371 U.S. 415 (1963). In Sierra Club v. Morton, 405 U.S. 727 (1972), the Court denied Sierra Club standing in a suit to enjoin approval of a ski resort development in the Mineral King Valley of Sequoia National Forest. The Court stated that "a mere 'interest in a problem', no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." Id. at 739. The Court indicated that the necessary ingredient missing in Sierra Club was an allegation by the club "that it or its members would be affected in any of their activities or pastimes by the * * * development." Id. at 735. Such an allegation of membership harm was made in United States v. SCRAP, 412 U.S. 669 (1973), and the Court found standing.

Herein, NWF has alleged that a number of its members periodically visit and enjoy public lands in Wyoming administered by BLM under the Taylor Grazing Act and enjoy the wildlife inhabiting such lands, including the American bald and golden eagles. Such alleged personal involvement of its members is sufficient to grant standing under the guidelines set forth in Sierra Club v. Morton, supra.

It is clear that NWF had standing in this case and that it fell within the category of "any other person." The Judge should have considered NWF's appeal on the merits.

[3] The regulation which NWF has argued requires the Department to take disciplinary action and which we have set forth above, 43 CFR 4113.1, states that a grazing license may be suspended, reduced, revoked, or renewal thereof denied for a clearly established violation of (1) the terms or conditions of the license, (2) the Act or any provisions of "this part," or (3) any approved special rule.

It could be argued that absent a specific provision in the license, section 4113.1 does not authorize the suspension, reduction, or revocation of a grazing license for the killing of bald or golden eagles. Nowhere in the terms and conditions of the original license to Bolten, the Taylor Grazing Act, or the regulations for "this part," meaning 43 CFR Part 4110 - The Federal Range Code for Grazing Districts, are we able to find any language relating to the killing of eagles, nor can we find any approved special rule relating thereto. Accordingly, the Secretary might have no power to impose sanctions pursuant to 43 CFR 4113.1. Although 50 CFR 22.11 (1974) (formerly 50 CFR 11.1 (1973)), prohibits the taking of bald or golden eagles, such section of Title 50 CFR is not a part of 43 CFR Part 4110.

[4] However, the Secretary of the Interior is not limited by 43 CFR 4113.1 in determining whether to renew a grazing license. The Secretary or his delegate is not obligated to issue a grazing license or permit to an applicant. The issuance of such permits or licenses is committed to agency discretion. Chournos v. United States, 193 F.2d 321 (10th Cir. 1951); Bedke v. Quinn, 154 F. Supp. 370 (S.D. Idaho 1957). Thus, the Secretary may refuse to renew a grazing license where it has been proved to his satisfaction that there has been a violation of the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 et seq. (1970), or 50 CFR Part 22.

The Act provides that the courts may impose penalties upon persons convicted of criminal violations under the Act (§ 668(a)), and that the Secretary of the Interior may, after notice and hearing, impose penalties for civil violations under the Act (§ 668(b)). Also, the Secretary may cancel immediately a grazing license or

permit of any person convicted of any violation, criminal or civil, under the Act (§ 668(c)).

Herein, NWF has sought to prevent the renewal of Bolten's grazing license. The Act contains no specific provision concerning nonrenewal of grazing privileges. However, as stated above, the Secretary may refuse to renew a grazing license where it has been proved to his satisfaction that there has been a violation of 16 U.S.C. § 668, or 50 CFR Part 22. Moreover, if the Secretary may immediately cancel an existing grazing license for violation of the Act, it follows that he may also refuse to issue a new license or to renew a license for such violation.

[5] The issue, then, is whether the case should be remanded for a hearing to determine the propriety of the District Manager's decision to renew.

The decision of the District Manager to renew the grazing license of Bolten Ranch on the recommendation of the District Advisory Board in 1972 was made when the facts surrounding the eagle killings were in dispute. The District Manager was faced with two alternatives. First, he could disregard the Advisory Board's recommendation and refuse to renew the license based purely on the allegations linking Werner to the eagle killings. In that case Bolten would surely have appealed and a hearing before an Administrative Law Judge on the denial would have followed. Pending the final outcome of its appeal, Bolten Ranch could have continued to use its grazing privileges unless the District Manager made his decision immediately effective because the orderly administration of the range or other public interest so dictated. See 43 CFR 4.477.

The other alternative open to the District Manager was to issue the license. This is the course he followed. Due to the disputed facts surrounding the killings and considering the substantial acreage and livestock involved, the best interests of range management and fairness to the applicant apparently dictated the allowance of continued grazing on the federal range pending the resolution of the disputed facts.

But the license that was issued contained the express stipulation that it was being authorized without prejudice to any action or proceeding instituted looking toward reduction, cancellation, or revocation based on the alleged involvement of principals of Bolten Ranch, Inc., in the eagle killings. Such authorization was without prejudice to any order or decision resulting from such action or proceeding.

The intent of the stipulation was to give BLM or any other agency the authority to institute proceedings and recommend sanctions to be imposed on the grazing license. As discussed below,

criminal proceedings were subsequently initiated against Werner and the corporation.

Considering the District Manager's two alternatives, the results of each would have been similar. Under both the corporation would have continued to graze its livestock on the federal range pending the outcome of other proceedings. Option one would have precipitated a hearing which would have elicited facts concerning the killings. A finding of complicity on the part of Werner in the killings could have meant an affirmation of the denial of privileges. Under option two provision was made for the subsequent reduction, cancellation, or revocation of the license if in later proceedings findings were made concerning the involvement of Werner or the corporation in the killings.

The District Manager's decision to issue the license containing the stipulation was not, under the circumstances, an abuse of discretion.

After the District Manager's decision, prosecution by information was initiated in the United States District Court for the District of Wyoming against Herman Werner and Bolten on charges of killing eagles in the vicinity of Bolten Ranch in violation of federal law. Werner died on August 8, 1973. On August 13, 1973, the District Judge issued an "Order Dismissing Information" against him. A similar order was issued on October 26, 1973, dismissing the information against the corporation, Bolten Ranch, Inc.

On October 1, 1973, Bolten Ranch, Inc., by Werner's successors in interest, contracted to sell the land embraced within Bolten Ranch and to assign, inter alia, the renewed Section 3 license at issue to J. Burton Tuttle of Platteville, Colorado. As pointed out above, the license contained the following provision:

This license is authorized without prejudice to any action or proceeding that may hereafter be instituted looking toward reduction, cancellation, or revocation of the license under applicable regulations, arising out of the alleged involvement of principals of the Bolten Ranch, Inc. in the killing of eagles alleged to have occurred heretofore on or in the vicinity of the Bolten Ranch, and such grazing authorization is without prejudice to any order or decision resulting from such action or proceeding.

Tuttle took possession of the ranch on November 1, 1973, and the settlement took place in early January 1974. The record does not disclose any impediment in the qualifications of Tuttle to receive a license or permit to graze livestock on the federal range.

It is not known whether Bolten Ranch, Inc., still exists as a legal entity or whether it had assets other than the ranch itself. However, the Bolten Ranch is now owned by Tuttle and the grazing privileges attendant to the land have been transferred to him. Werner is thus removed from this proceeding insofar as any sanctions are concerned. The question remaining is whether a hearing should be ordered to determine whether sanctions against Bolten are (or were) warranted, and, if so, whether they should be imposed on Tuttle.

[6] While Tuttle obviously had knowledge that the federal grazing license might be in jeopardy because of the eagle killings allegedly involving Werner, the charges against Werner and his solely-owned corporation have never been proved. The alleged principal culprit, Werner, is dead. The charges against him and the corporation have been dismissed. A hearing now under the circumstances could well be inconclusive. To put Tuttle and the Government through the expense of such an exercise would be of dubious value. At this time neither the cause of justice nor the public interest would be served by so doing.

Even if Werner were alive and the corporation still in existence, a criminal conviction under 16 U.S.C. § 668(a) or determination of guilt by the Secretary under § 668(b) need not result in sanctions against the grazing license under § 668(c), regardless of who held it. Such sanctions are discretionary. If fines were imposed under §§ 668(a) or (b) and/or imprisonment under § 668(a), such punishment might be deemed sufficient. This is especially so if the license is transferred and the transferee is innocent of any transgression under those sections.

We do not mean to intimate that in all cases in which a transfer of base property is made, a transferee of the license may escape sanctions for regulatory or statutory violations by his transferor. But the existence of those violations should be determined after notice and opportunity for hearing. Moreover, the events precipitating the present transfer and the transfer itself do not appear to have been made for the purpose of frustrating the imposition of sanctions.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the

Administrative Law Judge's order is reversed; the grazing license will remain in effect.

Newton Frishberg
Chief Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Martin Ritvo
Administrative Judge

